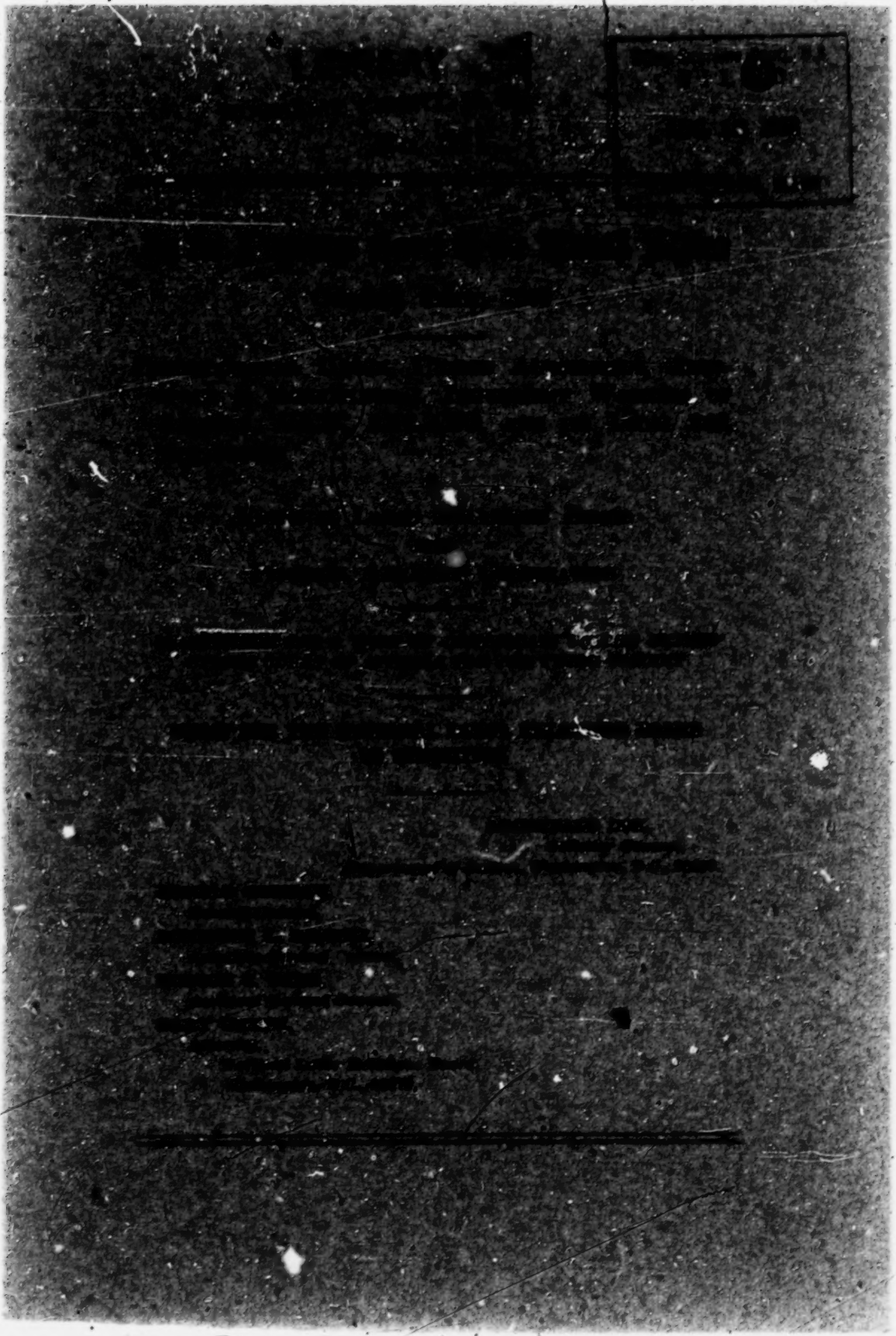

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697-166—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 271

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, AFL-CIO, AND ITS LOCAL 840, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

AND

PIASECKI AIRCRAFT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 36–37) is reported at 316 F. 2d 239.

JURISDICTION

The decree of the court of appeals (Pet. 38) was entered on May 22, 1963. The petition for a writ of certiorari was filed on July 13, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board must conduct a formal, trial-type hearing, upon the demand of a charging party, before determining whether substantial compliance with the terms of a court-enforced Board order has been achieved.

2. Whether the Board was reasonable in accepting the compliance proposal submitted to it.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at page 5 of the petition.

STATEMENT

Petitioners, an International Union and its Local (hereafter called "the Union"), seek review of an order of the Board denying their motion that a compliance proposal submitted by the General Counsel of the Board be rejected and that a formal hearing be held. The underlying facts, as they appear from the exhibits attached to the pleadings in the court of appeals,[1] are as follows:

The Union had been party to bargaining agreements with Bellanca Aircraft Corporation covering the employees at Bellanca's New Castle, Delaware, plant. In 1956, Bellanca sold its plant to Piasecki Aircraft Corporation of Philadelphia and the employment of most of the New Castle personnel terminated upon transfer of ownership. Upon charges

[1] The Exhibits attached to the Petition for Review filed by the Union are designated "Pet. Exh." Those attached to the Board's Amended Answer are designated "Bd. Exh."

filed by the Union, and after proceedings under Section 10 of the Act, the Board found, *inter alia*, that Piasecki had discriminatorily refused to hire 133 former Bellanca employees because of their union membership. The Board's order directed Piasecki to cease and desist from the unfair labor practices found, to reinstate these employees with backpay at the New Castle plant, and to bargain collectively with the Union as the representative of the employees at that plant. *Piasecki Aircraft Corporation*, 123 NLRB 348. The court below enforced the Board's order (*Piasecki Aircraft Corporation* v. *National Labor Relations Board*, 280 F. 2d 575 (C.A. 3), certiorari denied, 364 U.S. 912, 933), entering a decree on September 7, 1960 (Pet. 38).

Upon entry of that decree, the Board's Regional Office in Philadelphia began assembling the information necessary to determine the extent of Piasecki's liability. Inquiry was made of the 133 discriminatees regarding their interim earnings from other employment, periods of unavailability for work, extent of search for other employment, and expenses incurred in seeking it (Bd. Exh. 1). In addition, Regional Office personnel examined social security administration records, W-2 income tax forms, and other earnings records. From the information thus obtained, a calculation was made for each individual of quarterly interim earnings from other employment, additional expenses in securing it, and periods of unavailability or loss of qualification for backpay (Bd. Exh. 4).

A putative employment history was then constructed for each discriminatee had he been hired by Piasecki. Each discriminatee was assigned a Piasecki job classification on the basis of his prior experience and skills (Bd. Exh. 8). By reference to Piasecki's employment records at the New Castle plant, it was then ascertained when employees were actually hired in these classifications and their subsequent employment history. The employment opportunities thus revealed were "credited" to the discriminatees according to their seniority and qualifications. A computation was made as to what each discriminatee would have earned had he been in that job with Piasecki, and, from this gross figure, a setoff was made for his interim earnings and periods of unavailability (Amended Answer pp. 3, 4). In this task; the Regional Office personnel were assisted and advised by Charles W. Hypes, an International Representative of the Union, who had been employed at the New Castle plant for many years and had first-hand knowledge of the skills of each discriminatee (Bd. Exhs. 9a, 9b; Amended Answer p. 3).

The investigation also took into account the fact that, in December 1959, Piasecki had shut down the New Castle plant (Amended Answer p. 4). Although no charges were filed alleging that the operation had been terminated for discriminatory reasons or in order to frustrate compliance, the Regional Director considered these possibilities (Bd. Exh. 16). On the basis of his investigation, including the extensive and detailed data supplied by Piasecki (Bd. Exhs. 6, p. 2; 10), he concluded that the shutdown was economically

motivated (Bd. Exh. 16). An investigation was then made to determine whether the discriminatee's rights could be carried over to Piasecki's Philadelphia Plant on the theory that it and New Castle were really a single operation. The Regional Director concluded that, because of the differing nature of the work performed at the two plants, they could not be treated as a single operation, and that a reinstatement obligation at the Philadelphia plants could only be justified with respect to a few of the discriminatees whose skills were such that they might have been transferred to the Philadelphia plant from a job in New Castle (Bd. Exhs. 10, 16).

Union representatives were informed of the progress of compliance efforts, and were asked for their views. In addition to information gained through the participation of Hypes in determining the possible job classifications and of Local 840 officials in assisting in the completion of employee earnings statements, Union representatives received copies of all the voluminous correspondence that passed between the Region and the Company (Amended Answer, p. 5). On February 13, 1962, Lowell Goerlich, Union counsel, and Bert Bothe, UAW Regional Director, conferred with the Regional Director and his staff with regard to the Region's backpay computations and views, and to present their own views in the matter (Amended Answer, p. 6). On April 13, 1962, Goerlich had a conference in Washington with the General Counsel of the Board, at which time he was afforded a similar opportunity to present the Union's position (*ibid.*). On April 26, 1962, after the Com-

pany presented material in support of its assertion that the New Castle plant was closed for economic reasons and that the New Castle and Philadelphia plants were separate enterprises (Bd. Exhs. 10–12), the Regional Director phoned Union Counsel Goerlich. He told Goerlich that it was his judgment that compliance should be accepted on the basis of the payment of back pay for so long as the discriminatees would have been employed at the New Castle plant, with no reinstatement at Philadelphia except for eight employees. The Regional Director invited Goerlich to come to the Regional Office at his earliest convenience to discuss the matter, but the invitation was declined by Goerlich because of other work (Amended Answer, p. 6).

Further discussions between the Regional Director and the Company resulted in an agreement on the terms of the proposed compliance (Bd. Exh. 13). On May 25, Goerlich was informed by the Regional Director of the terms proposed and was given an opportunity to enter into the compliance agreement (Bd. Exh. 14). The offer was refused (*ibid.*), and the Regional Director entered into the agreement without the Union (Bd. Exhs. 15 and 17). Both the International Union and Local 840 sent letters of protest. These were answered in detail by the Regional Director who again explained the basis for the terms accepted and again offered to review with Union representatives any aspect of the compliance they wished to discuss (Bd. Exhs. 14, 16, 18, 19, 20, 21).

The compliance terms accepted (Bd. Exh. 17) provided for the Company to pay $143,000 to the dis-

criminatees, as backpay for employment they would have had at New Castle but for the unfair labor practices. In the opinion of the Regional Director, that sum represented substantially complete compensation for the 95 discriminatees considered entitled to backpay. Of the remaining discriminatees, 10 had interim earnings in excess of the backpay estimated for them, 28 were not credited with any employment at New Castle because the available employment opportunities had been preempted by other discriminatees with greater seniority, and one failed to answer all Board inquiries (Amended Answer, p. 7). The compliance agreement further provided that the eight discriminatees, whose reconstructed work history showed they might have been transferred to Philadelphia, were to be offered employment at the Philadelphia plant and each paid an additional $1,000 in backpay, to cover what they would have earned there absent the discrimination (Bd. Exhs. 13, 14 and 16). Since the New Castle operation had been discontinued for valid reasons and the bargaining requirements of the Board's order ran only to that plant,[2] the compliance agreement did not impose on the Company any obligation to bargain with the Union (Bd. Exhs. 11 and 17).

On June 1, 1962, the Union filed a motion with the Board alleging that the compliance agreement did not "constitute full compliance with the Board's Order in that said proposed settlement does not provide for

[2] See *Piasecki Aircraft Corp.* v. *National Labor Relations Board*, 280 F. 2d at 591-592 (C.A. 3).

the restitution of all backpay owing discriminatees, reinstatement of all employees entitled to reinstatement under the Board's Order, or recognition of the Charging Parties by Piasecki as required under the Board's Order" (Pet. Exh. B, p. 2). The Union requested the Board to institute formal backpay proceedings which would include a hearing, and to permit the Union to participate in such proceedings (*ibid.*). The Board concluded that, in view of the termination of Piasecki's New Castle operations, it was "satisfied that under all the circumstances substantial compliance with the Board Order and Court Decree" would be achieved by the agreement. It therefore denied the Union's motion (Pet. Exh. C).

The Union then filed in the court below a petition to review the Board's order denying its motion to set aside the compliance agreement and to hold a hearing. The court denied this petition, holding that the Union "was allowed every opportunity to present its views on the question of compliance and in disapproval of the settlement * * * [that] the settlement agreement is in substantial accord with the provisions of the decree * * * [and that] there has been no abuse of discretion by the Board in working out the settlement * * *." The court added: "In its settlement of the problems presented, the Board reached an admirable, practical result under all the difficult circumstances" (Pet. 36–37).

The court concluded that it had jurisdiction to review the question, for the petition was "clearly ancillary" to the original proceeding in which it had enforced the Board's order (Pet. 36).

ARGUMENT

The decision of the court below is clearly correct, there is no conflict of decisions, and no issue warranting review by this Court is presented.

1. Petitioners repeatedly assert (Pet. 17, *passim*) that the Board entered into a compliance agreement with the Company without according them a hearing. But, as the Statement amply demonstrates, petitioners were heard at every stage of the compliance proceedings. Union representatives assisted in the computation of the backpay figures and were kept informed of the progress of the negotiations; Union counsel had personal conferences with the Board's Regional Director and General Counsel respecting the proposed settlement; before the Regional Director arrived at a final decision, he explained the basis therefor to Union counsel and afforded him an opportunity (which he did not accept) to discuss the matter further; and, after the Regional Director made his decision, the Union presented its objections to the compliance agreement to the Board, which, after consideration, found that they did not warrant setting the agreement aside.[1]

Petitioners contend, however, that they were entitled to a trial-type hearing. They urge that, since a

[1] In the light of the procedure followed (which was outlined to the court below in the Board's amended answer and the exhibits attached thereto), petitioners err in stating that there is no factual basis for the court's conclusion that the Union was allowed every opportunity to present its views (Pet. 9, n. 2), and that the Board based its order solely upon the recommendation of the General Counsel (Pet. 22–23).

trial-type hearing is provided (and indeed required) when the Board first finds that unfair labor practices have been committed and enters its remedial order, the same procedure must be utilized in determining whether there has been compliance with that order, on the theory that the compliance proceeding is merely a continuation of the original proceeding (Pet. 18–20). This contention reflects a fundamental misconception of the nature of compliance proceedings and the powers of the Board.

The Board enforces "public" and not "private" rights, and accordingly it has exclusive power to determine, not only when proceedings to enforce its orders shall be instituted, but also whether contempt proceedings shall be instituted for failure to comply with a court enforcement decree. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261. The power to determine whether to institute contempt proceedings necessarily includes the power to evaluate the sufficiency of compliance with a court decree. Although Section 10(c) provides a formal hearing procedure for determining the initial question whether an unfair labor practice has been committed and the remedy therefor, the Act does not specify any particular procedure for determining compliance questions. This is because questions of compliance, like the question whether an unfair labor practice charge shall be "settled" rather than taken to formal proceedings, involve problems which are often best determined by informal administrative proceedings rather than by a trial-type hearing. For example, it

may be necessary, as with the closing of the New Castle plant here, to make an adjustment for changed conditions. Or, it may be necessary to make a judgment as to whether, in view of the lapse of time since commission of the unfair labor practices and the hazards of future litigation, a lesser measure of relief would better effectuate the policies of the Act than would greater relief attained at some uncertain time in the future. Thus, it has consistently been recognized that the Board may properly work out the details of compliance by "negotiation" in appropriate situations, without the necessity for resorting to a supplemental trial. *Nathanson* (Mackenzie Coach Lines) v. *National Labor Relations Board*, 344 U.S. 25, 29–30; *Vapor Blast Independent Shop Worker's Ass'n* v. *Simon*, 305 F. 2d 717, 719–720 (C.A. 7); *National Labor Relations Board* v. *Ozark Hardwood Co.*, 282 F. 2d 1, 8–9 (C.A. 8). Such informal settlement is consistent with due process. See *Federal Communications Commision* v. *WJR*, 337 U.S. 265, 274–276; *New Orleans* v. *New Orleans Water Works Co.*, 142 U.S. 79, 88; *Fay* v. *Douds*, 172 F. 2d 720, 725 (C.A. 2).

The cases relied upon by petitioners (Pet. 14–15) are inapposite. In *Textile Workers of America* v. *National Labor Relations Board*, 294 F. 2d 738 (C.A. D.C.), and *Local Union No. 112, Intl. Union Allied Industrial Workers* v. *Rothman*, 209 F. Supp. 295 (D. D.C.), settlements were accepted without explaining the reasons therefor to the charging party and affording it an opportunity to present its views. Neither of these cases holds that a formal trial-type

hearing was required. This is shown by the supplemental decision in *Textile Workers*, 315 F. 2d 41 (C.A. D.C.), not cited by petitioners, which sustained the settlement after the Board had explained the reasons therefor. *Marine Engineers' Beneficial Ass'n* v. *National Labor Relations Board*, 202 F. 2d 546 (C.A. 3), held that, after issuance of a complaint, unfair labor practice charges could not be settled over the objection of the charging party but had to proceed to formal hearing under Section 10 of the Act. The court, however, recognized that the situation might be different where, as here, an unfair labor practice order had issued and the question of compliance was involved (see 202 F. 2d at 547, n. 3). Indeed, by sustaining the Board's action in this case, the Third Circuit confirmed that its earlier decision in *Marine Engineers* has no application to the situation here.

2. Both in their motion to the Board (Pet. 39–40) and here, petitioners merely assert an abstract right to a trial-type hearing without showing that the result would have been any different had one been held. Petitioners do not challenge the validity of the assumption on which the Regional Director entered into, and the Board approved, the compliance agreement with the Company; they simply contend that, since the agreement did not provide for fulfilling every term of the Board's order, the Board lacked authority to accept it without according them a full hearing (Pet. 28–31). In view of the shut down of the New Castle plant for economic reasons, literal compliance with every term of the Board's order was

manifestly impossible. The Board could not have insisted that the employees be reinstated to jobs which were no longer in existence, nor, absent a basis for concluding that the jobs at the New Castle plant were interchangeable with those at the Philadelphia plant, could it have automatically transferred the reinstatement obligation from the former to the latter. Similarly, since the bargaining obligation was imposed only on the assumption that the Union would represent a majority of the employees at the New Castle plant (*supra*, p. 7), it could not properly be extended to Philadelphia where the Union would at most represent only eight employees. The only part of the order which could properly be implemented in these circumstances was the back pay remedy, and there is no suggestion that the total sum of $14,000, which represented substantially complete compensation for the 95 discriminatees entitled to backpay (*supra*, p. 7), did not adequately discharge the backpay obligation. Accordingly, the court below correctly concluded that there was "no abuse of discretion by the Board" (Pet. 36–37).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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